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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1029

CONREN, INC. d/b/a GREAT SCOT SUPERMARKET,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

WILLIAM E. ROBERTS,
JACK H. ROGERS,
1110 Fletcher Trust Building,
Indianapolis, Indiana 46204,
Counsel for Petitioner.

MIDWEST LAW PRINTING CO., 326 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-3966

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CONREN, INC. d/b/a GREAT SCOT SUPERMARKET,

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v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Conren, Inc. d/b/a Great Scot Supermarket (hereinafter called "Petitioner") prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Seventh Circuit (hereinafter called "Seventh Circuit") enforcing an order of the National Labor Relations Board (hereinafter called "Board") against the Petitioner.

CITATIONS TO OPINIONS BELOW.

The opinion of the Seventh Circuit (printed in Appendix A hereto, *infra*, pp. 1a to 7a) is reported at 368 F.2d 173. The court's decree enforcing the order of the National Labor Relations Board and the court's order denying Petitioner's Petition for Rehearing and Rehearing En Banc are unreported (the court's decree enforcing the Board's order appears in Appendix B hereto, *infra*, p. 8a; the order denying Petitioner's Petition for Rehearing and Rehearing En Banc appears in Appendix C hereto, *infra*, pp. 9a to 10a). The decision and order of the Board (J.A. 7-82)[1] are reported at 156 N.L.R.B. No. 43.

[1] "J.A." refers to joint appendix used in the United States Court of Appeals for the Seventh Circuit.

JURISDICTION.

The decision of the Seventh Circuit was entered October 12, 1966. Petitioner's timely petition for Rehearing and Rehearing En Banc was denied on December 1, 1966. The jurisdiction of this Court is invoked under 62 *Stat.* 928 (28 U.S.C. Section 1254(1)) and under 61 *Stat.* 136, as amended, (29 U.S.C. Section 160(e)).

QUESTION PRESENTED.

Did the Petitioner have a duty to bargain with the Retail Clerks Union[2] on March 19, 1964, and by refusing to do so violate Section 8(a)(5) of the Act when that same Union had, less than one (1) year before (nine (9) months and twelve (12) days), lost a valid N.L.R.B. election in the same unit?

FEDERAL STATUTE INVOLVED.

The primary statutory provisions involved are Sections 8(a)(5), 9(a), 9(c)(1) and 9(c)(3) of the National Labor Relations Act (hereinafter called "Act"). 61 *Stat.* 136 as amended (29 U.S.C. Sections 158(a)(5), 159(a), 159(c)(1) and 159(c)(3)). All pertinent parts of the Act appear in Appendix D, *infra,* pp. 11a to 14a.

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[2] Retail Store Employees Union, Local 550, Retail Clerks International Association, AFL-CIO.

STATEMENT OF CASE.

Basis of Federal Jurisdiction—The jurisdiction of the Seventh Circuit was invoked to review an order of the National Labor Relations Board issued pursuant to the National Labor Relations Act.

Facts of Case—On June 7, 1963, there was a valid N.L.R.B. election held at the Petitioner's store in Terre Haute, Indiana, with two (2) unions on the ballot—Clerks and Teamsters Local Union 144. (J.A. 558.) At this election, twenty-one (21) employees voted for "no union", five (5) employees voted for the Clerks and two (2) for the Teamsters. (General Counsel's Exhibit 10, J.A. 717.) Objections to the election were filed by the Clerks Union but were withdrawn with the approval of the National Labor Relations Board. (General Counsel's Exhibit 10, J.A. 717.) On July 3, 1963, the National Labor Relations Board *certified* the June 7, 1963 election results showing that a majority of the employees had not voted for any labor organization and that no valid objections to the election had been filed. (General Counsel's Exhibit 11, J.A. 718.)

On March 19, 1964, the Clerks Union demanded recognition based on the fact that a majority of Petitioner's employees signed authorization cards. The demand by the Clerks Union on March 19, 1964, was nine (9) months and twelve (12) days after the previous valid election in which they had received only five (5) of twenty-eight (28) votes. (General Counsel's Exhibit 17, J.A. 724.) The National Labor Relations Board found that the Petitioner did have a duty to bargain with the Clerks Union on March 19, 1964,

and by refusing to do so violated Section 8(a)(5) of the Act, even though the Clerks Union had lost a valid N.L.R.B. election less than one (1) year (nine (9) months and twelve (12) days) before. (J.A. 17 through 18.)

The Seventh Circuit, in a two-to-one decision, agreed with the Board and found that Petitioner did have a duty to bargain on March 19, 1964, with the Clerks Union. (Appendix A, *infra* pp. 1a to 4a.) However, Judge Kiley, in a dissenting opinion, found that because of the previous valid election and certification issued nine (9) months earlier, Petitioner had no duty to bargain with the Clerks Union for one (1) year thereafter and thus did not violate Section 8(a)(5) of the Act by refusing to bargain on March 19, 1964. (Appendix A, *infra,* pp. 4a to 7a.)

REASONS FOR GRANTING THE WRIT.

1. **Decision Conflicts With Supreme Court Case**—The majority decision of the Seventh Circuit conflicts with *Ray Brooks* v. *NLRB*, 348 U.S. 96 (1954). The majority opinion makes no attempt to distinguish the *Ray Brooks* case. In *Ray Brooks*, the facts were: The union was certified as a result of a N.L.R.B. election and one (1) week after the election the company received a written petition from a majority of its employees stating they did not wish to be represented by the certified union. The Supreme Court held that the certified union would be considered the employee's representative for a period of one (1) year after the election, notwithstanding the employees' petition, saying:

> "Congress has devised a formal mode for the selection and rejection of bargaining agents and has fixed the spacing of an election with a view of furthering industrial stability and with due regard to administrative prudence. We find wanting the arguments against these controlling considerations." *Ray Brooks* v. *NLRB*, 348 U.S. at 103.

The controlling considerations which the Court used in reaching its decision in *Ray Brooks* were: (1) In political elections the voters' choice binds them for a fixed period of time. This is equally relevant in healthy labor relations; (2) A Board election is conducted with many safeguards to protect the employees' free choice. Rejection or designation of a union should occur under a procedure no less formal than that of the employees' initial choice, and an employees' choice reflected in a public statement is not comparable to a choice reflected in the privacy of a voter's booth; and (3) The certification year rule was designed to

promote industrial stability. Because of these reasons, the Court concluded that the certified union would be the employees' representative for one (1) year notwithstanding its rejection by a majority of the employees.

Applying the same reasons to the instant case, the conclusion would be that a union which loses an election is a minority union for one (1) year. If the Clerks Union had won the election, and the employees signed cards rejecting them nine (9) months later, there could be no doubt that the Union would be their representative for one (1) year. The only difference between the present case and *Ray Brooks* is that in the present case the Union lost the election, and in *Ray Brooks* the union won. Yet this difference cannot be a basis for distinguishing the two (2) cases, for the important fact is *in both cases the results of the election were certified by the Board.* If the certification in *Ray Brooks* was valid for one (1) year, why is the certification in the instant case not valid for one (1) year? This is exactly the point made by Judge Kiley in the dissenting opinion, (Appendix A, *infra,* p. 7a), when he said,

> "The Wagner Act provided for certification only if union won an election. The Taft-Hartley Act requires certification whether the union wins or loses. Thus the converse of the holding in *Brooks* ought to control this decision."

Thus, Judge Kiley points out that the *Ray Brooks* decision should control the instant case, and by reaching a different result the majority opinion is in conflict with the holding in *Ray Brooks.* Further, the policy reasons stated in *Ray Brooks* apply equally whether a union wins or loses an election. If the Court found the fact situation in *Ray Brooks* important enough in 1954 to warrant granting certiorari, certainly when a case conflicts with that decision certiorari should be granted.

2. Decision Conflicts With Eighth Circuit Case.—The majority decision of the Seventh Circuit in the instant case conflicts with the holding of the Eighth Circuit in *NLRB* v. *Blades Manufacturing Co.*, 344 F.2d 990, 1004 (8th Cir. 1965). The majority attempted to distinguish the *Blades* case; yet, as Judge Kiley pointed out, it clearly is not distinguishable. (Appendix A, *infra*, p. 6a.)

In *Blades* there was an N.L.R.B. election which the union lost. The union filed objections and the Board set aside the election. The second election, which the union won, was held nine (9) months and five (5) days after the first. The Board then certified the union. The company refused to bargain, contending the first election was valid. The Board found the company violated Section 8(a)(5) of the Act based on its refusal to bargain after the union won the second election. The Eighth Circuit reversed and held that the first election was valid and thus the company was under no obligation to recognize or bargain with the union for twelve(12) months thereafter, saying:

> "Inasmuch as the first election was valid, the company was under no duty to recognize or bargain with the union." 344 F.2d at 1004.

The majority in the present case attempted to distinguish *Blades* on the ground that in *Blades* the union's representative status was based on the results of a second election which took place less than one (1) year (nine (9) months) after a previous valid election and thus, the Company was under no duty to bargain. In the instant case, the majority said that if instead of a second election the majority status of the Union had been determined by the authorization cards, there would have been a duty to bargain. But, in *Blades* the court found no duty to bargain

because of the previous valid election occurring less than one (1) year before. In regard to the *Blades* case, Judge Kiley said in the dissenting opinion:

> "In *Blades* the court nullified a second election (choosing the union) within a year of a valid election rejecting the union. This was by virtue of the prohibition of Section 9(c)(3). But the holding of no 8(a)(5) violation was based upon the lack of any duty upon the employer to recognize the union, even though the void election showed a majority favored the union. Presumably, the court recognized 9(c)(3) as indicating the policy of industrial peace."

The *Blades* case cannot be distinguished. Thus, there is a conflict between the *Blades* case in the Eighth Circuit and the Seventh Circuit holding in the instant case.

3. Decision Nullifies Certain Taft-Hartley Amendments to the Act—The primary sections of the Act involved in the instant case are Sections 9(c)(1) and 9(c)(3).[3] (Appendix D, *infra,* pp. 12a to 13a.) Section 9(c)(1) requires, in part, that the Board certify the results of an election and Section 9(c)(3) prohibits the Board from conducting more than one (1) election per year after a valid certification. The majority opinion of the Seventh Circuit, however, renders both of these provisions a nullity and completely frustrates the congressional purpose behind their passage.

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[3] Section 8(a)(5) of the Act is also involved since it is the basis of the Board's unfair labor practice finding that the Company refused to bargain with the Clerks Union. However, Section 8(a)(5) presupposes a duty to bargain on the part of the Company, and it is this issue which is before the Court in this case. It is only after finding a duty to bargain on the part of the Petitioner that a violation of Section 8(a)(5) can occur.

The basis of the majority decision is that when Congress amended Section 9(c) of the Act in 1947, ". . . [C]ongress was aware of the alternative methods of establishing and determining union representative status" but that Congress only sought to accomplish its objective by prohibiting more than one (1) election per year. Thus, it is the majority's position that Congress, in passing the Taft-Hartley amendments, specifically acknowledged and approved that a union's majority status could be established either by authorization cards or an election. However, this contention is not sustained either by the amendments themselves or the legislative history of the Act.

There can be no question that prior to the Taft-Hartley amendments the majority opinion would be correct, for Section 9(c) of the Wagner Act did provide that in determining the majority status of a union, "The Board may take a secret ballot of employees or utilize *any other suitable method of ascertaining such representation*". (Emphasis added.) 49 *Stat.* 453. (See Wagner Act, Appendix E, *infra,* pp. 15a to 16a) Thus, the Wagner Act did give the Board the choice of using either an election or *"any other suitable method"* (presumably authorization cards) to determine a union's majority status. Further, Section 9(c) of the Wagner Act provided that the Board should certify the name of the labor organization selected by a majority of the employees, but made no provision for certifying the *results* of an election if the union lost.

But, the Taft-Hartley amendments in 1947 deleted Section 9(c) and instead substituted Sections 9(c)(1), (2), (3), (4) and (5)[4]. Under the Taft-Hartley amendments,

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[4] Section 8(a)(5) has remained unchanged since it was originally enacted in the Wagner Act. This was Section 8(5) of the Wagner Act. (Appendix E, *infra,* p. 16a.)

the phrase "any other suitable means", contained in Section 9(c), which had permitted the Board to utilize methods other than an election to determine the employees' choice, was deleted. Section 9(c)(1) provided that the results of a secret ballot election must be *certified* by the Board whether the union won or lost, and Section 9(c)(3) prohibited an election for one (1) year after a valid certification. Under the Wagner Act, a union could, upon losing an election, immediately proceed to obtain additional cards and have another election within a short time. This, of course, would mean constant organizational campaigns and a disruption of industrial peace. The legislative history contained in S. Rep. No. 105, 80th Cong. 1st Sess. 25 (1947) clearly points this out:

> "At present, if the union loses [an election], it may on presentation of additional membership cards secure another election within a short time, but if it wins its majority, it cannot be challenged for a year."

In order to correct this, Congress passed Section 9(c)(1) and (3). It is clear that the object of Congress in passing these provisions was twofold:

(1) As Senator Taft, spokesman for the Taft-Hartley amendments, said, concerning Section 9(c)(3):

> "The bill also provides that elections shall be held only once a year so that there should not be a constant stirring up of excitement by continual elections." 93 Cong. Rec. 3838 (1947).

This objective was reiterated during the debates on the Landrum-Griffin Act when it was said in S. Rep. No. 187 on Senate 1555, 86th Cong. 1st Sess. 77 (1959), as follows:

> "One of the basic purposes of the Act is to promote industrial stability and peace. To this end, Section 9(c)(3), for example, prohibits more

than one election per year and was included in the Taft-Hartley Act to give both the employees and employers a period of peace free from the unsettling effects of a union organizational campaign."

(2) Congress, by limiting elections to one (1) a year, also wanted to impress upon employees the importance of their ballot in an election. As stated in S. Rep. No. 105, 80th Cong. 1st Sess. 12 (1947):

"In order to impress upon employees the solemnity of their choice, when the government goes to the expense of conducting a secret ballot, the bill also provides that elections in any given unit may not be held more frequently than once a year."

But, under the majority decision the one (1) year of industrial peace after an election sought by Congress in 1947 will be completely frustrated. Judge Kiley clearly pointed this out when he said:

"In this case the Union's soliciting of cards within a year of the valid election is as disruptive of industrial peace as a second election."

Further, employees will not take their vote seriously when they know that they can rescind it the next day by signing an authorization card. The most important effect of the majority decision, however, is that the issuance of a certification after a union loses an election has no meaning.

In summary, the majority opinion returns the Act to its pre-1947 state by rendering the issuance of a certification after a union loses an election meaningless, and defeats the congressional purpose behind the passage of Sections 9(c)(1) and 9(c)(3). Only the dissenting opinion of Judge Kiley fulfilled the congressional intent be-

hind the passage of Section 9(c)(3) and gives meaning to the certification which issues after a union loses an election. As Judge Kiley said:

> "I cannot accept the majority view that under sections 8(a)(5) and 9(a) Conren had an obligation to recognize the Union. The view my opinion expresses serves the congressional purpose of the act, is not precluded by sections 9(a) and 9(c), is justified under the Board and court decisions and is within the spirit of a developing statutory law."

When, by a two-to-one decision, part of the Taft-Hartley amendments are rendered a nullity and the Act itself returned to its pre-1947 state, the impact of the majority decision on the administration of the National Labor Relations Act is obvious.

4. Summary—Not only does the majority opinion of the Seventh Circuit in the present case conflict with the Supreme Court's holding in *Ray Brooks* v. *NLRB,* 348 U.S. 96 (1954) and the Eighth Circuit's holding in *NLRB* v. *Blades Mfg. Co.*, 344 F.2d 998 (8th Cir. 1965), but also is contrary to the congressional intent and purpose behind the passage of Sections 9(c)(1) and 9(c)(3) of the Act. The decision of the majority will have the effect of changing the course of labor law. Now, just as prior to 1947, organizational campaigns will never end and the employee will not take his vote seriously since he knows he can rescind it the next day by signing an authorization card. Even though the Taft-Hartley amendments provided that the results of elections which unions lose are now to be certified, the majority holding renders such certification meaningless. There can be no question that the

majority opinion returns the one (1) year certification rule to its pre-1947 state. An act of Congress has thus been rendered a nullity.

Finally, the majority opinion leads to absurd results. As Judge Kiley pointed out, the Court in *Ray Brooks* v. *NLRB* stated that the most reliable means of obtaining the wishes of employees was by secret ballot election—not authorization cards. Yet, what the majority is actually holding is that the *least* reliable method (cards) will establish majority status, within one (1) year of a valid election, but that the *most* reliable means (an election) will not. Only by following Judge Kiley's dissenting opinion, can the congressional purpose be served and an absurd result avoided.

CONCLUSION.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

Respectfully submitted,

WILLIAM E. ROBERTS,
JACK H. ROGERS,
Counsel for Petitioner.

APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1966—SEPTEMBER SESSION, 1966

No. 15504

CONREN, INC., d/b/a GREAT SCOT SUPERMARKET,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review and Set Aside and Cross-petition for Enforcement of an Order of the National Labor Relations Board.

October 12, 1966

Before CASTLE, KILEY and FAIRCHILD, *Circuit Judges.*

CASTLE, *Circuit Judge.* This case is before the Court upon a petition to review and set aside, and upon the cross-petition of the National Labor Relations Board to enforce, an order of the Board issued against the petitioner, Conren, Inc. The Board's decision and order are reported at 156 NLRB No. 43.

The Board found that Conren violated Section 8(a)(1), (2), (3) and (5) of the National Labor Relations Act, as amended, and by its order directs Conren to cease and desist from the unfair labor practices found. Affirmative-

(1) Conren is also directed to disestablish and withhold recognition from an employee organization it was found to have instigated, aided and supported in violation of the Act; and to offer reinstatement to, and reimburse for lost earnings, certain employees it was found to have discriminatorily discharged for union activity and adherence.

ly, the order requires, among other things,[1] that Conren upon request bargain collectively with the Union.[2]

One of the principal issues this proceeding presents for our determination is whether the fact that the Union's demand for recognition and the commencement of contract negotiations, which Conren ignored was made within less than one year—actually some nine months and sixteen days—after a valid Board conducted representation election in which the employees of the unit involved rejected both the Union and another labor organization (Teamsters, Chauffeurs, Warehousemen and Helpers Local Union 144) in favor of "no union" precluded the existence of any duty on the part of Conren to recognize and bargain with the Union.

From the record it appears that the Union's March 19, 1964 demand for recognition as the exclusive bargaining representative of the employee unit and for the commencement of bargaining negotiations was based on its possession on such date of authorization cards signed by 32 of the 53 employees in the unit as a result of a new organizational campaign commenced by the Union in March of 1964.

Conren contends the valid election held on June 7, 1963, only nine and one-half months previously, and which the Union lost, eliminated any duty on the part of Conren to bargain with the Union. Although Section 9(c)(3) of the Act[3] in its terminology expressly embraces only an "election" in placing the limitation it does on the Board's authority to direct the holding of a representation election, Conren reasons that the purpose of "furthering industrial stability" judicially recognized as one of the reasons why Congress so fixed the spacing of elections (*Brooks* v. *N.L.R.B.*, 348 U.S. 96, 103) equally affords a basis for precluding a union which has lost a representation election from acquiring within the prescribed twelve-month period a status by other means, such as the signing of authoriza-

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(2) Retail Store Employees Union, Local 550, Retail Clerks International Association, AFL-CIO.

(3) 29 U.S.C.A. §159(c)(3) which in pertinent part provides: "No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. . . ."

tion cards by a majority of the employees involved, which places the employer under a duty to bargain with that union. This may well be. But the language and legislative history of Section 9(c) clearly indicate that Congress was aware of the alternative methods of establishing and determining union representative status, but that it concerned itself only with limiting the frequency of Board directed and conducted elections for such purpose when it enacted Section 9(c)(3). Congress not only established the policy but it also selected the means to aid in effectuating it. Petitioner's argument is misdirected. That Congress chose one method of furthering a prime objective of its legislative purpose does not afford a basis for this Court to select and impose an additional but different means. For this Court to so extend a similar post-election proscriptive period to a union's acquisition of representative status (with concomitant creation of employer duty to bargain with the Union upon demand) by means of authorization cards would in our opinion constitute an attempt by the Court to usurp a legislative prerogative.

Conren's reliance on *N.L.R.B.* v. *Blades Mfg. Corp.*, 8 Cir., 344 F.2d 998, is misplaced. That case is inapposite. There, the Court found that there had been two elections within a one-year period, that the first election was valid and that the second, therefore, was invalid. Since the union's asserted representative status was based solely on the results of the second election it was held that the company had no duty to recognize or bargain with the union. The case did not involve a union demand for recognition based on authorization cards, and the Court, therefore, had no occasion to consider the issue raised here of whether an employer is required to recognize and bargain with a union within a year following a valid election on the basis of a showing of authorization cards executed by a majority of the employees.

We have considered all of the other contentions advanced by the petitioner as justifying its refusal to recognize and bargain with the Union, and the additional contentions asserted by petitioner as demonstrating the existence of evidentiary and legal infirmities in the

Board's findings and conclusions with respect to the other violations which are the subject of the Board's order. We perceive no useful purpose which would be served by extending this opinion to discuss these additional matters. From our examination of the record we are convinced that considered as a whole it contains substantial evidence, which together with reasonable inferences which may be drawn therefrom, supports the critical factual findings upon which the Board's ultimate conclusions rest, and we are of the opinion that those conclusions represent the application of correct legal criteria.

Conren's petition to set aside the Board's order is denied, and the Board's cross-petition for the enforcement of its order is granted. It is ordered that the Board's order be enforced and that a decree issue for that purpose.[4]

ENFORCEMENT ORDERED.

KILEY, *Circuit Judge,* dissenting in part.

I respectfully dissent in part. It is my opinion that Conren did not violate section 8(a)(5) by refusing to accede to the Union's bargaining demand on March 19, 1964, and that the authorization cards offered by the Union to show majority status were insufficient to put Conren under a duty to bargain because the Union had lost a valid election within the previous year, on June 7, 1963.

I cannot accept the majority view that under sections 8(a)(5) and 9(a) Conren had an obligation to recognize the Union. The view my opinion expresses serves the congressional purpose of the act, is not precluded by sections 9(a) and 9(c), is justified under the Board and court decisions and is within the spirit of the developing statutory law.

The majority relies upon the language and legislative history of section 9 as a clear indication that Congress was aware of alternative means of selection but limited the prohibition in section 9(c)(3) to elections in effectu-

[4] A motion of the Board to strike from the caption of the case the names of parties against whom the order issued by the Board was not directed was taken with the case. That motion is hereby allowed. The caption appearing above reflects the deletions.

ating the congressional policy of industrial peace. It infers that, Congress having placed a limit on one means, this court is precluded from imposing a limit on additional, different means.

Under section 8(a)(5) an employer may not "refuse to bargain collectively with the representatives of his employees, subject to the provisions of section [9(a)]. . . ." Since section 9(a) speaks of representatives "designated [presumably by the Board after an election] or selected [presumably through less formal means] for the purposes of collective bargaining," it is evident, as the majority recognizes, that Congress did not intend elections under section 9(c) to be the only means by which a union could become the bargaining representative within the meaning of section 8(a)(5). *UMW* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 71-72 (1956); *NLRB* v. *Larry Faul Oldsmobile Co.*, 316 F.2d 595, 596-97 (7th Cir. 1963). But it does not follow, as the Board and the majority indicate, that the Company's refusal to recognize the Union on the basis of authorization cards was an unfair labor practice under section 8(a)(5) where the Union had lost a valid election within the previous year.

While section 9(a) is silent as to the appropriateness or relative merits of the various means of choosing a bargaining agent, the Board and the courts have, in certain factual situations, made some distinctions between elections and less formal means of selection for purposes of section 8(a)(5). For example, an employer may be ordered to bargain with a union without an election where he has sought to use the election process to gain time to dissipate the union's majority status. *Joy Silk Mills, Inc.* v. *NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied*, 341 U.S. 914 (1951). On the other hand, where an employer is presented with conflicting representation claims of rival unions, none of which are certified, it may not recognize any of them until an NLRB election has been held. *Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060, 1070 (1945); *Barney Wilkerson Constr. Co.*, 145 N.L.R.B. 704, 705 (1964). The Board has imposed the *Midwest Piping* doctrine on an employer even where one of the competing

unions had a majority of authorization cards. *Novak Logging Co.*, 119 N.L.R.B. 1573, 1574-75 (1958). See also *St. Louis Independent Packing Co.* v. *NLRB*, 291 F.2d 700 (7th Cir. 1961).

In a related line of cases the Board and the courts have, after conflicting representation determinations, preferred election results over less formal means or vice versa, depending on the facts of the particular case. Where a union became defunct during its certification year, for instance, the Board has held that a subsequent showing of majority through authorization cards subjected the employer to a duty to bargain, despite the one-year certification rule. *Rocky Mountain Phosphates, Inc.*, 138 N.L.R.B. 292, 295 (1962). In other circumstances, the courts have held that election results prevailed over subsequent less formal determinations of majority status. *Brooks* v. *NLRB*, 348 U.S. 96 (1954); *NLRB* v. *Blades Mfg. Corp.*, 344 F.2d 998, 1004 (8th Cir. 1965).

The rule in all of these decisions which have put a gloss on section 9(a) is that under certain circumstances only the most reliable means will be used in order to insure the employees' freedom of choice. The holdings in the *Brooks* and *Blades* cases illustrate the application of this principle in fact situations somewhat analogous to that before us.

In *Brooks* the Court sustained the union chosen in a valid election against a petition of an employee majority within a year of the election in affirming the Board's finding of an 8(a)(5) violation. It did not rest its holding upon the express 9(c)(3) limitation on the administrative powers of the Board. Instead the Court relied on the congressional policy of industrial peace reflected in the one-year spacing of 9(c)(3). In *Blades* the court nullified a second election (choosing the union) within a year of a valid election rejecting the union. This was by virtue of the prohibition in section 9(c)(3). But the holding of no 8(a)(5) violation was based upon the lack of any duty upon the employer to recognize the union even though the void election showed a majority favored the union. Presumably, the court recognized 9(c)(3) as indicating the policy of industrial peace.

In *Brooks* the Supreme Court discussed the reasoning of the courts and Board with respect to the pre-Taft-Hartley "working rule" of the Board regarding the so-called "certification year." The Court summarized the reasoning, part of which is: that the binding effect of an election, which provides responsibility in the electorate and needed coherence in administration, is "equally relevant to healthy labor relations"; that the revocation of authority conferred or withheld in a "solemn and costly" election should occur by no less a solemn occasion; and that a petition or a public meeting influenced by mass psychology is not comparable to the privacy and independence of the voting booth.

These considerations are just as important, in my view, in the question before us, where the "solemn and costly" Board-conducted election resulted in a loss to the Union and in the less "solemn" expression an employee majority within a year demanded recognition on the basis of cards. The Wagner Act provided for certification only if the union won an election. The Taft-Hartley Act requires certification whether the union wins or loses. Thus the converse of the holding in *Brooks* ought to control this decision.

The decisions and statutory development provide the congressional principle and decisional rule which control my opinion. In this case the Union's soliciting of cards within a year of the valid election is as disruptive of industrial peace as a second election. In these circumstances, the rule of using the most reliable means (the valid election which the union lost) to insure employee freedom of choice should preclude the finding of an 8(a)(5) violation.

I would set aside the Board's finding of the 8(a)(5) violation.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Opinion by Judge Castle
(Dissent in part by Judge Kiley)

In the United States Court of Appeals

For the Seventh Circuit

Wednesday, October 12, 1966
Before
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

No. 15504

CONREN, INC., d/b/a GREAT SCOT SUPERMARKET,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition to Review and Set Aside, and Cross-petition for Enforcement of an Order of the National Labor Relations Board.

This cause came on to be heard on the petition to review and set aside an order of the National Labor Relations Board, and the answer and cross-petition for enforcement of said order, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered by this Court that the petition to review and set aside the order entered by the National Labor Relations Board on January 5, 1966, be and the same is hereby denied, and the cross-petition of the National Labor Relations Board for enforcement of its order be, and the same is hereby granted. The said order will be enforced, and upon presentation, an appropriate decree will be entered, in accordance with the opinion of this Court filed this day.

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

Thursday, December 1, 1966
Before
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*

No. 15504

CONREN, INC., d/b/a GREAT SCOT SUPERMARKET, ET AL.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for review of an order of the National Labor Relations Board.

It Is Ordered that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

In the
United States Court of Appeals
For the Seventh Circuit

Thursday, December 1, 1966
Before

Hon. JOHN S. HASTINGS, *Chief Judge*
Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*
Hon. WIN G. KNOCH, *Circuit Judge*
Hon. LATHAM CASTLE, *Circuit Judge*
Hon. ROGER J. KILEY, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. WALTER J. CUMMINGS, JR., *Circuit Judge*

No. 15504

CONREN, INC., d/b/a GREAT SCOT SUPERMARKET, ET AL.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for review of an order of the National Labor Relations Board.

It Is Ordered by the Court that the petition for a rehearing *en banc*, filed by the petitioner herein, be, and the same is hereby, DENIED.

APPENDIX D

The pertinent parts of the National Labor Relations Act, 61 *Stat.* 136, as amended, (29 U.S.C. Secs. 151 *et seq.*) are as follows:

1. Section 8(a)(5), National Labor Relations Act (61 *Stat.* 140-141, as amended, 29 U.S.C. Sec. 158(a)(5)).

"(a) It shall be an unfair labor practice for an employer—

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)."

2. Section 9(a) and 9(c)(1) and (3), National Labor Relations Act (61 *Stat.* 143, 144, as amended, 29 U.S.C. Secs. 159(a), 159(c)(1) and 159(c)(3)).

"Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment."

* * *

"Sec. 9(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

* * *

"Sec. 9(c)(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the

ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election."

3. Section 10(e), National Labor Relations Act (61 *Stat.* 147-148, as amended, 29 U.S.C. Sec. 160(e)).

"(e) The Board shall have power to petition any United States court of appeals, or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence

to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28."

APPENDIX E

The pertinent parts of the National Labor Relations Act (Wagner Act) (49 *Stat.* 449) referred to in the Petition for Certiorari are as follows:

1. Section 8(5) of the National Labor Relations Act (Wagner Act) (49 *Stat.* 452-453).

   "Sec. 8 It shall be an unfair labor practice for an employer—

   * * *

   (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

2. Section 9(a), (b) and (c) of the National Labor Relations Act (Wagner Act) (49 *Stat.* 453).

   "Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer."

   "Sec. 9(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."

"Sec. 9(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertin [sic] such representatives."